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ALEXANDER L. STEVAS,
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80-1763

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

E. J. SALCINES, as State Attorney in and for Hillsborough County, Florida,

Petitioner,

vs.

JOHN L. BRIGGS, as Attorney for Sheldon Cooper and Cooper-Fletcher & Associates, Inc., and John L. Briggs, as Interim Attorney for John Joseph,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS SECOND DISTRICT, STATE OF FLORIDA

AND APPENDIX

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
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Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

QUESTION PRESENTED

MAY AN ATTORNEY, BY VICARIOUSLY ASSERTING HIS CLIENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, SUCCESSFULLY DEFEAT A SUBPOENA FOR TANGIBLE EVIDENCE (that may be the instrumentality of a crime) WHICH HAD BEEN DELIVERED TO HIM BY HIS CLIENT, ON THE MERE CONTENTION THAT IN PRODUCING THE EVIDENCE HE WOULD BE AUTHENTICATING IT.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS SECOND DISTRICT, STATE OF FLORIDA

OPINION BELOW

The opinion of the District Court of Appeal, Second District, State of Florida, is reported in 392 So.2d 263 and appears in the appendix hereto as "A 1-13".

JURISDICTIONAL STATEMENT

The District Court of Appeal, Second District, entered its judgment on September 24, 1980 (A. 1-13). On November 20, 1980, it denied a timely filed petition for rehearing and a request to certify the question to the Supreme Court of Florida (A. 14-15). On March 9, 1981, the Supreme Court of Florida denied discretionary review

(A. 19-20). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) in that, the Supreme Court of Florida having denied discretionary review, certiorari is sought from the highest court of the State of Florida in which a decision could be had, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). This petition for writ of certiorari was filed within sixty (60) days of the day (March 9, 1981) that the Supreme Court of Florida denied discretionary review.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

The Fourteenth Amendment provides:

". . . nor shall any State deprive any person of life, liberty or property without due process of law. . . "

STATEMENT OF THE CASE

In the course of giving a deposition in a civil lawsuit one John Joseph testified that he had tape recorded some fifteen telephone conversations between himself and others without telling the other parties to these conversations. In Florida the recording of a telephonic conversation by one party to the conversation without the consent of the other party is an illegal intercept.[1]

This petitioner, as State Attorney, was notified of this possible violation of Florida law. In the interim the tape

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1 Section 934.03 Fla.Stat., *State v. Walls*, 356 So.2d 294 (Fla. 1974).

recordings were delivered to respondent Briggs as attorney for Joseph. Petitioner, as State Attorney, served Attorney Briggs with a subpoena duces tecum requiring production of the tape recordings. Attorney Briggs filed a motion to quash asserting Joseph's Fifth Amendment privilege against self-incrimination (A. 4-6). The trial court rejected the argument and denied the motion to quash.

Attorney Briggs sought review in the court below. The Florida appellate court reversed with instructions to quash the subpoena saying:

> Upon review, we have concluded that were the tapes in Mr. Joseph's possession, the forced production of them would amount to compelled incriminating testimonial communication in that the production would serve as authentication that Mr. Joseph had made the tape

> recordings. Consequently, Mr. Joseph could assert the protection of the Fifth Amendment, and therefore, Mr. Briggs, by invoking the attorney-client privilege, cannot be compelled to produce the tapes.
>
> (A. 12)

The lower court thus held that Attorney Briggs could vicariously assert his client's Fifth Amendment privilege against self-incrimination.

On rehearing petitioner pointed out to the Florida appellate court that, should Joseph ultimately be prosecuted for violating Florida law, evidence of compliance with the subpoena would not be necessary for authentication of the tapes; that they could easily be authenticated through Joseph's deposition and the testimony of the various persons whose communication he taped identifying

their voices and their conversations.

The Florida appellate court denied rehearing and refused to certify the question to the Florida Supreme Court (A. 13).

Petitioner sought discretionary review in the Florida Supreme Court. That court declined to accept discretionary review (A. 15-16).

REASONS FOR GRANTING THE WRIT

1. THE FLORIDA APPELLATE COURT DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court left unanswered the question as to whether an attorney may assert the Fifth Amendment privilege of his client. *See* footnote

8, *Fisher*. The Florida appellate court answered the question in the affirmative.[2] It held that if the tape recordings had been in Joseph's possession the forced production of them would have amounted to self-incrimination in that production of the tapes would serve as authentication. Consequently, Mr. Briggs, who had possession of the tapes could assert his client's Fifth Amendment privilege.

The question is one that should be decided by the Court. This Court has consistently held that Fifth Amendment rights against self-incrimination are personal rights which could not be asserted vicariously.[3] Now, the Florida

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2 At least one circuit has held in the negative, *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981).

3 *Couch v. United States*, 409 U.S. 322 (1973).

appellate courts are expanding the Fifth Amendment privilege beyond the scope which this Court has recognized.[4] Rights which previously could not be asserted vicariously can now be so asserted by attorneys in behalf of their clients. This directional change interposes a built-in layer of protection for criminal suspects. A suspect need only deliver the "smoking gun" to the attorney. Vicariously the attorney can assert his client's Fifth Amendment rights, not because the "smoking gun" itself violates the Fifth amendment, but because production would amount to authentication. If the lower court decision is correct and

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4 A state court is not free to impose greater restrictions as a matter of federal constitutional law when this Court has specifically refrained from imposing them, *Oregon v. Hass*, 420 U.S. 714 (1975).

had been decided during the Watergate investigations, all that former President Nixon need have done is deliver the tape recordings to his attorney.

2. THE FLORIDA APPELLATE COURT DECIDED THE ABOVE FEDERAL QUESTION IN A WAY IN CONFLICT WITH *FISHER v. UNITED STATES*.

The Florida appellate court held that the forced production of the tape recordings, without more, would amount to compelled incriminating testimonial communication in that the tape recordings would serve as authentication that Mr. Joseph had made the tape recordings. The decision creates a *per se* insurmountable Fifth Amendment barrier because of authentication problems which the Court refused to recognize in *Fisher*.

Quite to the contrary the Court in *Fisher* said that while the act of producing evidence in response to a subpoena might involve communicative aspects of its own which are both testimonial and incriminating, these aspects are ". . . minimal. . ." (425 U.S. 391, 412) and generally not ". . . deemed to be sufficiently testimonial for purposes of the privilege." (425 U.S. 391, 411).

3. THE LOWER COURT'S DECISION CONFLICTS WITH VARIOUS DECISIONS OF FEDERAL CIRCUIT COURTS OF APPEAL.

In interpreting this Court's *Fisher* decision, various federal circuit courts of appeal have refused to interject "authentication" as the insurmountable problem as has the Florida appellate court, *United States v. Authement*, 607

F.2d 1129 (5th Cir. 1980); *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981); *In Re Grand Jury Prodeedings United States*, 626 F.2d 1051 (1st Cir. 1980); *In Matter of Grand Jury Empanelled*, 597 F.2d 851 (3rd Cir. 1979); *Witte v. United States*, 544 F.2d 1026 (9th Cir. 1976).

In *Davis* the Fifth Circuit said that the authentication ". . . aspect should be ignored as de minimis when . . . there is no question as to the existence and location of [the evidence sought to be produced]" (text at 1041).

The operative facts in *Authement, supra*, are on all fours with those in the instant case: A police officer had been charged with violating the civil rights of an arrestee by, among other things, beating the arrestee with brass

knuckles. The officer had delivered the brass knuckles to his attorney. The government subpoenaed them from the attorney. On appeal Authement argued that the trial court had erred in denying the motion to quash the subpoena because production of the brass knuckles would amount to authentication of them. In rejecting this argument the Fifth Circuit pointed out that the knuckles were authenticated, not by Authement nor his attorney, but by another police officer.

Similarly in *In Re Grand Jury Proceedings United States*, the First Circuit held that any authentication problem that may arise by virtue of production of the evidence will not necessarily defeat a subpoena for pre-existing documents. It recognized that the government's access to evidence,

which is not of itself constitutionally protected, should not so easily be defeated and held that where authentication might be a problem it could be remedied by allowing the government to grant use immunity with respect to any authentication that might result from production of the evidence.[5]

The Third Circuit has held that where, as here, the documents (or evidence) are in possession of a third party, from whose possession they are subpoenaed, there is no authentication problem, *In Matter of Grand Jury Empanelled, supra.*

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5 The lower court quotes from *In Re Grand Jury Proceedings* in its decision, but omitted to explain that the First Circuit continued and held that the authentication problem could be obviated by granting use immunity.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the District Court of Appeal, Second District, State of Florida.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the _____ day of March, 1981, I served three copies of the Petition for Writ of Certiorari on John L. Briggs, Esquire, Briggs & LaSpada, P.A., Suite 500, Barnett Bank Building, 1000 N. Ashley Drive, Tampa, Florida 33602, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

JOHN L. BRIGGS, as Attorney for SHELDON COOPER and COOPER-FLETCHER & ASSOCIATES, INC., and JOHN L. BRIGGS, as Interim Attorney for JOHN JOSEPH, Appellant, v. E. J. SALCINES, as State Attorney in and for Hillsborough, County, Florida, Appellee.	CASE NO. 80-898

Opinion filed September 24, 1980.

Appeal from nonfinal order of the Circuit Court for Hillsborough County; Thomas A. Miller, Sr., Judge.

John L. Briggs of Briggs & LaSpada, P.A., Tampa, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

GRIMES, Judge.

In this case, attorney John L. Briggs seeks review of the denial of his motion to quash a subpoena requiring him to produce tape recordings in his possession which had been made by a client.

This matter arose out of a civil lawsuit in which Sheldon Cooper and Cooper-Fletcher & Associates, Inc. were plaintiffs and Map F. Fletcher and others were defendants. Mr. Briggs represented the plaintiffs, while Gregory E. Mierzwinski represented Mr. Fletcher.

During the course of the lawsuit, Mr. Mierzwinski took the deposition of John Joseph. Mr. Joseph, who was associated with Sheldon Cooper, testified that he had tape recorded fifteen telephone conversations between himself, the defendant Fletcher, and some of Mr.

Fletcher's associates. Mr. Joseph admitted that he did not tell Mr. Fletcher or any of the others that he was recording these conversations. He stated that the tape recordings were locked in the office of Sheldon Cooper.

On March 1, 1980, Mr. Briggs, acting on behalf of the plaintiffs in the lawsuit, filed a motion asking that the court impound the tapes because they might have been made in violation of the law. The motion also requested that the court order the tapes destroyed. On April 1, 1980, Mr. Mierzwinski reported the matter to the office of the Hillsborough County State Attorney, and on May 14, 1980, the judge presiding over the civil suit held a hearing on Mr. Briggs' motion. At this hearing, Mr. Briggs stated to the court that he was representing Mr. Joseph and that he had

possession of the tapes. The court ordered Mr. Briggs to turn over the tapes to the state attorney.

Mr. Briggs did not give the tapes to the state attorney as ordered but asked for a rehearing. The court granted his request, and at the hearing that followed, attorney John E. Lund appeared representing Mr. Joseph and asked to intervene. The court ruled that the tapes were inadmissible in the civil proceedings and that, contrary to its earlier ruling, it would not order their production. Thereafter, the state attorney served Mr. Briggs and Mr. Lund with subpoenas duces tecum requiring the production of the tapes.

Mr. Briggs and Mr. Lund filed motions to quash the subpoenas, and a judge of the criminal division of the circuit court held a hearing on these

motions. At this hearing, Mr. Lund represented to the court that Mr. Joseph had given the tapes to Mr. Briggs in the process of receiving legal advice from Mr. Briggs concerning them. He and Mr. Briggs then argued that since the recording of the tapes could be a violation of Florida law,[1] Mr. Joseph's Fifth Amendment right against self-incrimination protected him and Mr. Briggs, while acting as his attorney, from the forced production of the tapes. The court rejected this argument, denied the motion to quash and ordered production of the tape recordings. Subsequently, Mr. Briggs filed an appeal, and this court granted a motion to stay the trial court's order.

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1. *State v. Walls*, 356 So.2d 294 (Fla. 1978), holds that Section 934.03, Florida Statutes (1979), prohibits the secret recording of a conversation by a party to that conversation. *But see State v. Tsavaris*, 382 So.2d 56 (Fla. 2d DCA 1980), which urges the supreme court to revisit this issue.

As a preliminary matter, we must examine the question of whether we have jurisdiction to consider this appeal. Ordinarily, an order denying a motion to quash a subpoena duces tecum is a non-final order. There is nothing in Florida Rule of Appellate Procedure 9.130, dealing with review of nonfinal orders, or in Florida Rule of Appellate Procedure 9.140, dealing with appeals in criminal cases, which would indicate that we have jurisdiction to review this type of order. Thus, we cannot treat the matter as an appeal. This does not end our inquiry, however, because we do have the power to treat an improperly filed appeal as a petition for writ of certiorari. See Goff v. General Motors Corp., 292 So.2d 594 (Fla. 2d DCA 1974); Fla. R. App. P. 9.040. We think this case to be an appropriate matter for consideration by

certiorari. See Imparato v. Spicola, 238 So.2d 503 (Fla. 2d DCA 1970).

Of course, in order for us to grant the discretionary writ of certiorari, the order from which review is sought must be a departure from the essential requirements of the law and be such as to cause irreparable harm which cannot be remedied on appeal. Wright v. Sterling Drugs, Inc., 287 So.2d 376 (Fla. 2d DCA 1973). Taking the latter requirement first, we believe that in this case Mr. Briggs does not have an adequate remedy by appeal; if for no other reason, he is not a party to any proceedings in which a final judgment will be entered. The only other way in which he may test the court's order is to risk a contempt citation and then appeal if cited for contempt. We think that this is too great a price for him to have to pay in order to protect his

client's interests.

We also think that the court's refusal to quash the subpoena departs from the essential requirements of the law. The leading case in this area and the one which controls the outcome here is Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). There, the Supreme Court faced a situation where an attorney had in his possession business records prepared for his client by the client's accountant and given to him by a client in the course of seeking legal advice. The government sought to compel the attorney's production of the records by subpoena, but the attorney resisted, asserting the client's Fifth Amendment privilege against self-incrimination and also his attorney-client privilege. The Court held that the attorney-client privilege would protect an attorney from

the forced production of documents given to him by a client in the course of seeking legal advice if the documents were privileged in the hands of the client.[2] It then held that while the Fifth Amendment privilege against self-incrimination affords no protection to the contents of previously prepared documents, it does protect a person from producing documents under subpoena where the compelled production would amount to a forced testimonial

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2. Because the extent of the attorney-client privilege is a matter of state law, we are not bound to follow the Supreme Court's holding in this regard. However, we are confident that Florida's attorney-client privilege as embodied in Section 90.502, Florida Statutes, (1979), is broad enough to include the proposition which appears to be universally accepted that documents which are privileged in the hands of the client and which are given by the client to the attorney in the course of seeking legal advice remain privileged in the hands of the attorney. See 81 Am.Jur.2d Witnesses § 204 (1976).

communication which would be incriminating.[3]

In Fisher, the Court found that the forced production by a person of records prepared by his accountant did not rise to the level of testimonial communication. However, at least one later case, In re Grand Jury Proceedings, Nos. 79-1562, 79-1584 (5th Cir. May 23, 1980), has treated a situation where a person's response to a subpoena would have ammounted to testimonial communication. There, a federal grand jury was seeking the appointment books of a doctor. The court said:

> The line of cases culminating in Fisher have stripped the content of business records of any Fifth Amendment protec-

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3. Apparently there are no Fifth Amendment implications in the seizure of the same documents pursuant to a valid search warrant. Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

tion; such protection is afforded only to the testimonial content of the act of turning over the records under compulsion. Compliance with the subpoena may admit certain facts, such as the existence of the requested documents, which in most cases will be so trivial that the constitution is not implicated. In many cases, however, the authentication of the document, which may be proven by an official's testimony that he received them from the individual who prepared and possessed them, will provide a necessary link to incriminating evidence contained in the documents.

We have little hesitancy in agreeing with the district court that there is a sufficient probability that Dr. Rodriguez's compliance with the subpoena would produce incriminating authentication evidence. If the appointment logs disclose incriminating details about meetings with union officials, as the government suspects, the logs would need to be authenticated to be legally relevant. Because the records were prepared under the doctor's direction and were in his possession, his submission of them to the government would constitute sufficient authentication to allow introduction of the records' content

agaisnt him.

Slip op. at ____ (footnote and citations omitted).

Upon review, we have concluded that were the tapes[4] in Mr. Joseph's possession, the forced production of them would amount to compelled incriminating testimonial communication in that the production would serve as authentication that Mr. Joseph had made the tape recordings. Consequently, Mr. Joseph could assert the protection of the Fifth Amendment, and therefore, Mr. Briggs, by invoking the attorney-client privilege, cannot be compelled to produce the tapes.

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4. We think that in this instance the tape recordings were in the nature of business records because they were made of conversations centering around the business disputes which led to the civil litigation in which Mr. Joseph became involved. Thus we need not consider the questions left open in Fisher and In re Grand Jury Proceedings as to whether personal records and memoranda should receive more protection under the Fifth Amendment.

We hereby issue a writ of certiorari and remand the case to the circuit court with instructions that it quash the state's subpoena.

SCHEB, C.J., and OTT, J., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

NOVEMBER 20, 1980

JOHN L. BRIGGS, as Attorney for SHELDON COOPER and COOPER-FLETCHER & ASSOCIATES, INC., and JOHN L. BRIGGS, as Interim Attorney for JOHN JOSEPH, Appellant, v. E. J. SALCINES, as State Attorney in and for Hillsborough County, Florida, Appellee.	Case No. 80-898

Upon consideration, it is

ORDERED that appellee's Petition for Rehearing and for Rehearing En Banc and Motion for Leave to Amend Petition for Rehearing are hereby denied. It is further

ORDERED that appellee's Motion to Have Question Certified to the Supreme Court as a Matter of Great Public Interest

is hereby denied. It is further

ORDERED that appellee's Motion for Stay of Mandate and Amended Motion for Stay of Mandate are hereby denied.

A TRUE COPY
TEST:

WILLIAM A. HADDAD, CLERK
DISTRICT COURT OF APPEAL

BY /s/ Carol Stockrahm
Carol Stockrahm
Assistant Clerk

cc: Charles Corces, Jr.
John L. Briggs
John E. Lund

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

JOHN L. BRIGGS, as Attorney
for SHELDON COOPER and
COOPER-FLETCHER & ASSOCIATES,
INC., and JOHN L. BRIGGS,
as Interim Attorney for
JOHN JOSEPH,

Appellant/Appellee

v. Case No. 80-898

E. J. SALCINES, as State Attorney
in and for Hillsborough County,
Florida,

Appellee/Appellant.

AMENDED NOTICE

The notice of appeal filed in this cause on November 21, 1980, is amended to read:

NOTICE

NOTICE IS HEREBY GIVEN that E. J. Salcines, appellee, invokes the Discretionary Jurisdiction of the Supreme Court of Florida to review the decision of this court rendered September 24, 1980, rehearing denied November 20, 1980.

The nature of the decision is one which:

(a) Expressly construes a provision of the State or Federal constitution.

(b) Expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court of Florida on the same point of law.

See Article V, Section 3, Florida Constitution and In Re Emergency Amendments to Rules of Appellate Procedures, rule 9.030(2), 831 So.2d 1370.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ Charles Corces, Jr.
CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

Counsel for Appellee/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished, by U.S. Mail, to John L. Briggs, Esq., Briggs and Laspada, P.A., Suite 500, Barnett Bank Building, 100 N. Ashley Drive, Tampa, Florida 33602 and to John E. Lund, Esquire, Cicero & Lund, P.A., Suite 500, Barnett Bank Building, 1000 N. Ashley Drive, Tampa, Florida 33602, on this 1st day of December, 1980.

/s/ Charles Corces, Jr.

Of Counsel for Appellee/Appellant

SUPREME COURT OF FLORIDA

MONDAY, MARCH 9, 1981

E. J. SALCINES, as State Attorney in and for Hillsborough County, Florida,	*	
Petitioner,	*	CASE NOS. 59,962 & 59,963
v.	*	District Court of Appeal, 2d
JOHN L. BRIGGS, as attorney for Sheldong Cooper and Cooper-Fletcher & Associates, Inc., and JOHN L. BRIGGS, as Interim attorney for John Joseph,	*	District - No. 80-898
Respondents.	*	

****

These causes having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that

the Petitions for Review are denied.

No Motions for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, ALDERMAN and McDONALD, JJ., concur BOYD, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

TC
cc: Hon. William A. Haddad, Clerk
Hon. James F. Taylor, Jr., Clerk
Hon. Thomas E. Miller, Sr., Judge

Charles Corces, Jr., Esquire
John L. Briggs, Esquire
John E. Lund, Esquire

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CLERK

Case No. 80-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

E. J. SALCINES, as State Attorney
in and for Hillsborough County, Florida,

Petitioner,

vs.

JOHN L. BRIGGS, as Attorney for
Sheldon Cooper and Cooper-Fletcher
& Associates, Inc., and
John L. Briggs, as Interim Attorney
for John Joseph,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, SECOND DISTRICT, STATE OF FLORIDA

RESPONDENT'S REPLY TO PETITIONER'S JURISDICTIONAL STATEMENT

JOHN L. BRIGGS
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(813) 223-6048

Counsel for Respondent

QUESTION PRESENTED

DOES THE DISTRICT COURT'S FINDING THAT THE ATTORNEY-CLIENT PRIVILEGE WOULD PROTECT AN ATTORNEY FROM THE FORCED PRODUCTION OF DOCUMENTS GIVEN TO HIM BY A CLIENT IN THE COURSE OF SEEKING LEGAL ADVICE WHEN THE DOCUMENTS WERE ALSO FOUND TO BE PRIVILEGED IN THE HANDS OF THE CLIENT UNDER THE AUTHORITY OF *FISHER v. UNITED STATES* DENY JURISDICTION TO THIS COURT TO REVIEW THE DECISION OF THE STATE COURT?

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the Case.

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CASE NO. 80-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

E. J. SALCINES, as State Attorney
in and for Hillsborough County, Florida,
Petitioner,

vs.

JOHN L. BRIGGS, as Attorney for
Sheldon Cooper and Cooper-Fletcher
& Associates, Inc., and
John L. Briggs, as Interim Attorney
for John Joseph,
Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, SECOND DISTRICT, STATE OF FLORIDA

RESPONDENT'S REPLY TO PETITIONER'S JURISDICTIONAL STATEMENT

REASONS FOR DENYING THE WRIT

1. PETITIONER SALCINES HAS FAILED TO ESTABLISH THE REQUISITE JURISDICTIONAL BASIS TO WARRANT ISSUANCE OF A WRIT OF CERTIORARI.

Jurisdictional considerations of justiciability preclude this Court from exercising abstract supervisory powers of review over state court decisions such as the one here presented. The Petitioner fails to identify the personal injury affecting his own federal right. Petitioner Salcines attempts to raise an issue of

constitutional law by asserting that the court below erred in construing *Fisher v. United States*, 425 U.S. 391 (1976), *vis a vis* the Fifth Amendment implications of his subpoena duces tecum addressed to Respondent, an attorney, for production of his client's papers. Upon analysis the absence of a justiciable question and Petitioner's lack of standing are starkly apparent. Quite simply, the open question is—whose ox was gored?

Reference to Petitioner's Statement of the Case, as well as to the decision of the Court below appended to Petitioner's Brief, demonstrates that the claim of personal deprivation of a right secured by the United States Constitution arose not from Petitioner Salcines, but instead from the target of his criminal investigation. (Petitioner's Brief at 4 and A-3-5). Furthermore, the Court below decided the case on the independent state ground of attorney-client privilege. (Petitioner's Brief at A-9).

Upon receiving information that certain tape recordings, allegedly made by one of the parties to a telephone call in violation of §934.03, Florida Statutes (in contraposition to the Federal statute, 18 USC 2511 (2)(c), were in the custody of Respondent as the target's attorney, Petitioner attempted to execute a subpoena duces tecum ordering Respondent to produce the tapes. Respondent resisted on the grounds that his client invoked his Fifth Amendment rights, and the attorney-client privilege therefore precluded him from compliance.

The Florida Second District Court of Appeal ultimately agreed that where the client could assert the protection of the Fifth Amendment, compelled production of the tapes from his attorney would violate the attorney-client privilege and ordered the trial court to quash the subpoena. (Petitioner's Brief at A-12, 13). After Petitioner unsuccessfully exhausted his attempt to stay the issuance of the Mandate in the Florida courts as well as in this Court, the Mandate of the Florida Second District Court of Appeal requiring the trial court to quash the subpoena

duces tecum, issued on March 27, 1981, rendering the instant Petition moot. (Respondent's A-1, implementing state court's judgment in Petitioner's A-1-13).

A. PETITIONER SALCINES HAS FAILED TO PRESENT A JUSTICIABLE QUESTION TO THIS COURT.

The jurisdiction of the Supreme Court to review final decisions of state courts initially depends upon the existence of a justiciable case or controversy within the meaning of Article III of the United States Constitution. Hence, the exercise of appellate jurisdiction requires that the Supreme Court be "called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

Although in *Flast v. Cohen*, 392 U.S. 83, 95 (1968), the Court conceded that the notion of justiciability is a concept of uncertain meaning and scope, its parameters have been defined by various grounds upon which questions sought to be adjudicated have been held to be non-justiciable. In the instant case, three of the negative criteria articulated in *Flast v. Cohen*, apply. No justiciable controversy is presented (1) when the party seeks an advisory opinion, (2) when the question sought to be adjudicated has been mooted by subsequent developments, and (3) when there is no standing to obtain the action. *Id.* at 95.

First, Petitioner's question,

> ["May an attorney, by vicariously asserting his client's Fifth Amendment privilege against self-incrimination, successfully defeat a subpoena for tangible evidence (that may be the instrumentality of a crime) which had been delivered to him by his client, on the mere contention that in producing the evidence he would be authenticating it."]

seeks nothing more from this Court than an advisory opinion formulated in a vacuum of abstract propositions of law and questionable fact.

At present, the Mandate to quash the subpoena in question has been issued, (A-1) leaving Respondent free to terminate the attorney-client relationship and relinquish possession of the materials sought by subpoena. In short, the dispute is history. On parallel facts, in *Hall v. Beals*, 396 U.S. 45, 48 (1969), the Court refused to accept jurisdiction in a case which has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." (Citations omitted).

Beyond the Article III case and controversy limitation discussed in *Flast v. Cohen*, 392 U.S. at 95, limiting the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," the doctrine of mootness precludes review in the case at bar. As explained in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980), mootness has dual aspects. Thus, when either the issue presented is no longer viable or either of the parties lacks a legally cognizable interest in the outcome, the Court will decline to accept jurisdiction.

The fact that the instant controversy is no longer "live" is amply demonstrated by the disposition of the matter in the court below, mandating quashal of the subpoena duces tecum and leaving Respondent free to release the materials sought by subpoena to his former client. Likewise, the lower court's judgment leaves Respondent with no interest in the litigation, and Petitioner no adversary interest to be litigated in this Court.

Closely allied with the foregoing concepts of justiciability is the principle that Petitioner must show that enforcement of

challenged judgment would deprive him of some right arising under the Constitution or laws of the United States which he properly asserted in proceedings below. Although the *Flast v. Cohen* Court, 392 U.S. at 99, acknowledged the complexities peculiar to standing problems, it reiterated that the " 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions' ", citing *Baker v. Carr*, 369 U.S. 186, 204 (1962).

So measured, Petitioner's lack of standing is manifest, for it was not *his* ox that was gored. No where in the course of the proceedings below did Petitioner allege deprivation or abuse of any right secured for *him* by the United States Constitution or federal law, and no where did Petitioner assert any personal stake in the outcome of the proceedings. To the contrary, Petitioner's role throughout was only to investigate and prosecute alleged violations of Florida law as a quasi judicial constitutional officer of the State. Indeed, the anomaly of the instant case lies in the fact that Petitioner now predicates his request for review upon the constitutional right of *the target* of his investigation, *whose ox was gored.*

B. PETITIONER SALCINES HAS FAILED TO ESTABLISH THE EXISTENCE OF ANY SUBSTANTIAL FEDERAL QUESTION AND THE JUDGMENT BELOW RESTS ON INDEPENDENT STATE GROUNDS.

Even if Petitioner were able to satisfy the threshold duty of demonstrating standing to complain and the justiciability of his question presented, nevertheless he has failed to discharge the burden of showing that a substantial federal question was necessary to the lower court's determination in the instant case.

Although the preceding litigation stems from the invocation by a non-party witness of his Fifth Amendment rights, the question before the state court of final review turned not upon any federal right enuring to the present complaining party, but upon an application of the attorney-client privilege, purely a question of state evidentiary law. What is more, the fatal flaw in Petitioner's argument in favor of review is that he did not, nor was he able, to raise a substantial federal question at any stage of the state court proceedings below.

It is well-established unless the petitioning party can affirmatively show that he properly raised a federal question, *certiorari* must be denied. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). Moreover, jurisdiction in this Court is equally unavailable because the judgment below turned on an adequate independent state grounds.

> As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal court. (Citations omitted).

Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

In the instant case, the right asserted by Respondent, and the basis of the state court's judgment, was not a federal constitutional right, but instead the application of the attorney-client privilege as embodied in §90.502, Florida Statutes.

2. THE STATE COURT JUDGMENT NEITHER CONFLICTS WITH *FISHER v. UNITED STATES* NOR WITH FEDERAL APPELLATE DECISIONS.

The lower court expressly relied on the precedent established by *Fisher v. United States*, 425 U.S. 391 (1976), in ruling that the attorney-client privilege protects an attorney from

compliance with a subpoena for items given him by his client in the course of rendering legal advice if the items were privileged in the hands of the client. (Petitioner's Brief at A-8).

The essential fact which distinguishes the result in *Fisher* from the lower court's judgment is that *Fisher* involved documents prepared by a third party, hence not amenable to Fifth Amendment protection. In the instant case, on the other hand, the items Petitioner sought from Respondent were privately prepared by his client; being both testimonial and communicative *per se*, and reasonably thought to be self-incriminatory, they were immune from production under the Fifth Amendment in the hands of the client and protected by the attorney-client privilege while in the hands of his attorney.

Although Petitioner relies extensively on *United States v. Authement*, 607 F.2d 1129 (5th Cir. 1980), to buttress his argument that the judgment of the state court conflicts with federal decisions, the *Authement* court did not reach the question of subpoenaing self-authenticating private papers. Instead, *Authement* merely stands for proposition that tangible non-testimonial evidence is amenable to production from an attorney where independent sources of authentication exist. In other words, the communicative aspects of producing brass knuckles, unlike private recordings of one's own voice, do not rise to the standard of Fifth Amendment protection alluded to in *Fisher*.

Although *Fisher v. United States* left unanswered the question of whether authentication by an individual's production of his own personally prepared records "rises to the level of testimony within the protection of the Fifth Amendment", *id.* at 411, 414, the federal appellate courts have held that the privilege applies. Indeed, the court below relied on federal law in reaching the decision Petitioner asserts to be in conflict.

In *In Re Grand Jury Proceedings United States*, 622 F.2d

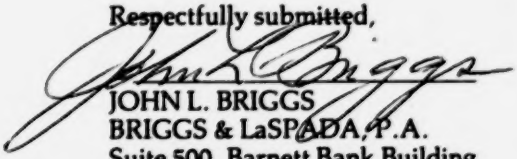
1051, 1056 (1st Cir. 1980), which the state court quoted at length, the First Circuit ruled that where the documents sought to be produced were prepared under the direction of the target and in his possession, his submission of them to the government would constitute self-incrimination. Similarly, in *Katz v. United States*, 623 F.2d 122 (2d Cir. 1980), the Second Circuit held that if the items sought by subpoena from an attorney would incriminate his client, disclosure of them might well fall within *Fisher's* proscription against the forced production of attorney-held papers which would in effect add "to the sum total of the Government's information." *Fisher v. United States*, 425 U.S. at 411. Significantly, the *Katz* court remanded the case for determination of whether the Fifth Amendment protected the items.

In summary, then, the instant judgment went no farther than answering the *Fisher* Court's open question in reliance on applicable federal precedent, hence performing the task the *Katz* court required of its lower court under *Fisher*. In so ruling, the state court acted in consonance with federal law, and its judgment should not be disturbed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JOHN L. BRIGGS, Respondent, and a member of the Bar of the United States, hereby certify that on the 23rd day of June 1981, I served three copies of Respondent's Brief in Opposition on Charles Corces, Jr., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by a duly addressed envelope with postage prepaid.

JOHN L. BRIGGS

MANDATE
From
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

County Hillsborough
Appellate Case No. 80-898
Your Case No. 80-7063 C

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and with the rules of procedure and laws of the State of Florida.

WITNESS, The Honorable John M. Scheb, Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said Court at Lakeland, Florida, on this day.

March 27, 1981

/s/ William A. Haddad
Clerk District Court of Appeal of Florida,
Second District